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No. -

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

RICHARD NEVINS, CONWAY COLLIS, ERNEST DRONENBURG, WILLIAM BENNETT, KENNETH CORY, CALIFORNIA STATE BOARD OF EQUALIZATION and STATE OF CALIFORNIA,
Petitioners,

VS.

HOOPA VALLEY TRIBE and HOOPA TIMBER CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Whether California may impose a timber tax on a non-Indian purchaser of timber harvested on an Indian reservation if the revenues from the tax are used to fund general government services to the Indian tribe even though the revenues do not directly fund the production of the timber.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement Of The Case	2
Reasons For Granting Writ	3
I	
Summary Of Argument	3
II	
White Mountain Apache Tribe v. Bracker And *Ramah Navajo School Board v. Board of Revenue* Are Distinguishable	4
In The Circumstances Of This Case The California Timber Tax Should Be Upheld Even Though It Is Not Directly Related To The Production Of Tribal Timber	6
California Has Demonstrated A Sufficient Interest To Uphold The Timber Tax	7
Conclusion	8

TABLE OF AUTHORITIES CITED

Page

Cases

Cotton Petroleum Corp. v. New Mexico ___ U.S.___ (1989) 4, 6
Crow Tribe of Indians v. State of Montana 819 F.2d 895 (9th Cir. 1987) 6
Crow Tribe of Indians v. State of Montana 650 F.2d 1104, 1113-1117, (1982) 6
McClanahan v. Arizona State Tax Commission 411 U.S. 164 (1973) 7
Ramah Navaho School Board v. Bureau of Revenue 458 U.S. 832, 847 (1982) 3, 5
White Mountain Apache Tribe v. Bracker 448 U.S. 136 (1980) 4

Statutes

28 U.S.C. Sections:
1254(1) 2
1331 2
1362 2
42 U.S.C. Section 1988 2
Cal.Rev. & Tax.Code Sections 38101 et. seq. 3

Regulations

General Forest Regulations, 25 CFR, part 1, section 163 .. 2, 3

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Petitioners California State Board of Equalization, et al. respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on July 28, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 881 F.2d 657 and is reprinted in the Appendix at pages A-1—A-15. The decision of the United States District Court for the Northern District of California is published at 590 F.Supp. 198 and is reprinted in the Appendix at pages A-16—A-25.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 28, 1989. No petition for rehearing was filed. This petition for certiorari was filed within 90 days of July 28, 1989. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution; General Forest Regulations, 25 CFR, Part 1, section 163 (1989); The California Forest Taxation Reform Act (Cal. Rev. and Tax. Code sections 38101 *et seq.*). The provisions of the Supremacy Clause and the General Forest Regulations are reprinted in the Appendix at pages A-26 and A-27—A-44 respectively. Selected provisions of the California Forest Taxation Reform Act are reprinted in the Appendix at pages A-45—A-49.

STATEMENT OF THE CASE

This action was brought pursuant to 28 U.S.C. sections 1331 and 1362. The District Court ruled that California was preempted by federal law from imposing the timber tax on purchasers of timber harvested on the reservation of respondent the Hoopa Valley Tribe but that the Tribe was not entitled to attorneys' fees under 42 U.S.C. section 1988. The Ninth Circuit upheld both rulings.

The reservation of the Hoopa Valley Tribe lies in a rural area in northeastern California.[1] The population of the reservation is approximately 60 percent Indian and 40 percent non-Indian. All persons living on the reservation, both Indian and non-Indian, are eligible for governmental services provided by California through the state and local governments. In 1983 the cost of these

[1] The factual record in this action consists of a 72 page stipulation of facts. Although filed in 1984, there is no reason to believe that the matters described in the stipulation, apart from the effects of inflation, do not apply to the reservation today.

services, which include education, health, welfare, road maintenance, police and other services, was approximately $4.75 million.

Due to the remoteness of the reservation and a lack of other economic opportunities, almost all of the Tribe's income is derived from its extensive timber resources. Timber production on the reservation is regulated by the Bureau of Indian Affairs pursuant to regulations governing bidding procedures and the like, (General Forest Regulations, 25 CFR, Part 1, section 163.) California does not provide any services which directly relate to timber production and does not have any jurisdiction over tribal timber. However, California maintains the only paved road access to the reservation, and presumably other services which California provides have an indirect effect on timber production by contributing to the intangible benefits of membership in an organized society.

In 1976 California enacted the Forest Taxation Reform Act (Cal.Rev. & Tax Code.§§ 38101 *et seq.*), which imposes a tax on the ownership of felled timber. In the circumstances of this case, the tax was imposed on non-Indian logging companies which had contracts to harvest timber on the Hoopa reservation, and neither the Tribe nor its members were liable for its payment. However, it is conceded that the Tribe bore at least a portion of the economic burden of the tax because logging companies take tax considerations into account in making their bids.

In the years 1977-83 the average rate of the timber tax was 4.96%. The total timber tax revenue obtained from Hoopa timber in these years was approximately $154,000 annually, or approximately 1/30th of the cost of the services which California provided to the reservation.

REASONS FOR GRANTING WRIT

I

SUMMARY OF ARGUMENT

As then Justice Rehnquist pointed out in dissent in *Ramah Navaho School Board v. Bureau of Revenue* 458 U.S. 832, 847 (1982), there is a need for "a consistent and predictable rule of

law . . . [concerning] . . . the extent to which the states can tax economic activity on Indian reservations within their borders." This case presents an opportunity for this Court to fulfill that need in an appropriate factual setting. The decisions of this Court on which the Ninth Circuit relied, *White Mountain Apache Tribe v. Bracker* 448 U.S. 136 (1980) and *Ramah*, are factually distinguishable because neither involved the nexus between tax revenues and Indian-benefiting expenditures which exist in this case. Furthermore, in *Cotton Petroleum Corp. v. New Mexico* ____ U.S. ____ (1989), 104 L Ed 2d 209, this Court appears to have taken a preemption approach which places greater weight on the states' revenue needs than was taken in *White Mountain* and *Ramah*.

II

WHITE MOUNTAIN APACHE TRIBE V. BRACKER AND *RAMAH NAVAJO SCHOOL BOARD V. BOARD OF REVENUE* ARE DISTINGUISHABLE

Viewing this case as governed by *White Mountain v. Bracker* 448 U.S. 136 (1980), the Ninth Circuit held that the federal interest in maximizing the income the Hoopa Tribe obtains from its timber resources outweighed California's interest in raising revenue from the non-Indian purchasers of Hoopa timber. However, *White Mountain* is distinguishable due to the nature of the taxes involved. In *White Mountain* the two taxes at issue were Arizona's use fuel tax and motor carrier license tax. In its opinion this Court recognized explicitly that the use fuel tax was intended to compensate Arizona for the use of its highways. (*Id.*, at 150) The opinion did not contain a description of the purposes of the motor vehicle license tax, but under Arizona law at the time the revenues from that tax were likewise expended solely for highway-related purposes.[2]

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[2] This Court's opinion states that the use fuel tax and the motor carrier license tax were imposed under Arizona Rev. Stat. (sup. 1979) sections 28-1552 and 40-641. (*Id.*, 139-140) At that time Arizona law provided that revenues from these taxes were to be deposited in the highway users revenue fund for the maintenance of the state highways

Yet the activity on which these taxes were imposed was the non-Indian taxpayer's use of roads on the reservation which were maintained not by Arizona but by the Bureau of Indian Affairs. As this Court noted, "this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall." (*Id.*, at 150). In contrast, this is precisely such a case.

Ramah Navajo School Board v. Bureau of Revenue 458 U.S. 832 (1982), also relied upon by the Ninth Circuit, is likewise distinguishable on similar grounds. *Ramah* involved the consequences of a decision by New Mexico to save $368,000 by closing the only public high school reasonably close to the reservation of the Ramah Navajo Tribe. In order to provide an education for its children, the Ramah Navajo Tribe then obtained congressional funding to build a high school on reservation property. New Mexico taxed the gross receipts of the non-Indian contractor which the Tribe hired to build the school. Using the preemption analysis mandated by *White Mountain*, this Court held against the tax because "[i]n this case, the State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of this tax." (*Id.*, at 843).

In *Ramah*, New Mexico did not prove either its contention that it provided significant governmental services to the Ramah Navajo Tribe or, if such services were provided, that the services were funded by the tax in question. (*Id.*, at 845, fn. 10)[3]

This case is different from *White Mountain* and *Ramah* because it is undisputed that the revenues from the California timber tax contribute to the funding of the services which the state provides to the tribe and tribal members. As noted above, the cost of these services in the years in question was thirty times greater than the timber tax revenue obtained from tribal timber.

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and related matters. (Arizona Rev. State. (sup. 1979) sections 28-1595 through 28-1598.)

[3] Whereas New Mexico did not take any responsibility for the education of the children of the Navajo tribe, California spent $2,679,323 in 1983 on the education of children living on or near the Hoopa reservation.

IN THE CIRCUMSTANCES OF THIS CASE THE CALIFORNIA TIMBER TAX SHOULD BE UPHELD EVEN THOUGH IT IS NOT DIRECTLY RELATED TO THE PRODUCTION OF TRIBAL TIMBER

The Ninth Circuit held that the use of the California timber tax to fund services provided to the Hoopa Tribe was irrelevant because the revenues did not directly relate to the production of the tribal timber. But in reaching this conclusion the Ninth Circuit relied upon *White Mountain* and *Ramah* which, as noted above, are distinguishable.[4]

In *Cotton Petroleum Corp. v. New Mexico*, U.S. ____ (1989) ____, 104 L Ed 2d 209, this Court appears to have taken a more flexible preemption approach which places greater weight on the revenue needs of the states. Recognizing that the "relevant preemption test is a flexible one" (*id.*, at ____, 104 L Ed 2d at 231), this Court upheld New Mexico's taxation of a non-Indian oil lease on the reservation of the Jicarilla Apache Tribe. *White Mountain* and *Ramah* were distinguished by this Court on the grounds that: (1) New Mexico provided substantial services to both the Tribe and the taxpayer; (2) the tax did not result in an economic burden on the Tribe; and (3) the federal regulations concerning oil and gas production were not exclusive. (*Id.*, at ____, 104 L Ed 2d at 232-233.) The first of these differences clearly applies in this case because the services which California provides to the Hoopa Tribe are significant and undisputed. With respect to the second difference, the Bureau of Indian Affairs logging regulations involved in this case are similar to the oil and gas regulations involved in *Cotton Petroleum* in that neither contains any reference to, let alone explicitly prohibits, state

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[4] The Ninth Circuit also relied on *Crow Tribe of Indians v. State of Montana* 819 F.2d 895 (9th Cir. 1987), rejecting an indirect tax on the mineral resources of the Crow Tribe. However, as an earlier decision in that litigation makes clear, the combined rate of the taxes involved was 30%, and the tax was viewed by the Ninth Circuit as an attempt by Montana to appropriate the Crow Tribe's mineral wealth. *Crow Tribe of Indians v. State of Montana* 650 F.2d 1104, 1113-1117, (1982), mod. 665 F.2d 1390 (1982), *cert. den.* 459 U.S. 916 (1982). No such intent appears in this case.

taxation. With respect to the third difference, while it is true that in this case the Hoopa Tribe bears some of the burden of the California tax, *Cotton Petroleum* upheld the New Mexico tax even though it had "at least a marginal effect" on the Jicarilla Apache Tribe. (*Id.*, at ____, 104 L Ed 2d at 233.) Furthermore, in this Court's view the taxpayer's strongest argument in *Cotton Petroleum* was the fact that the revenues from the New Mexico tax far exceeded the cost of the services provided. In this case the converse is true.

Admittedly, this Court found in *Cotton* that New Mexico had some regulatory involvment in oil production on the Jicarilla reservation whereas California has no direct involvement in timber production on the Hoopa reservation. However, New Mexico's involvement was nothing more than certain regulations concerning "the spacing and mechanical integrity of wells" (*Id.*, at ____, 104 L Ed 2d at 209) and therefore did not result in any financial drain on New Mexico. California's expenditures are significant and at least some of the services provided, such as roads, undoubtedly have at least an indirect impact on timber production. To use this Court's words, "[t]he intangible value of citizenship in an organized society is not easily measured in dollars and cents. . . ." (*Id.*, at ____, 104 L Ed 2d at 235.)

CALIFORNIA HAS DEMONSTRATED A SUFFICIENT INTEREST TO UPHOLD THE TIMBER TAX

The above discussion demonstrates that, for the purposes of preemption analysis, California's interest in upholding its timber tax is stronger than were the interests of Arizona and New Mexico in *White Mountan* and *Ramah*. The next question is whether that interest is sufficient to uphold the tax. We submit that it is.

In these days of limited government funds and increasing demands for government services, California necessarily must avail itself of every possible source of revenue if it is to continue to provide the services which the public expects. Yet the timber tax is the only tax which California imposes which even indirectly impacts on the Hoopa Tribe. Tribal land is immune from the state property tax, income generated on the reservation is immune from

the state income tax, and reservation sales to Indians are immune from the state sales tax, cigarette tax and liquor tax. See *McClanahan v. Arizona State Tax Commission* 411 U.S. 164 (1973).

It is true that the tax does result in a diminution of the income the Tribe derives from its timber. But the impact is small, and in any event a precedent upholding the tax may well operate as an encouragement to other states to provide a full range of services to Indian tribes. In this case California continued to make expenditures benefiting the Hoopa Tribe after the District Court ruled against the tax. There is no indication that California will not do so in the future. But it is at least conceivable that some jurisdictions which must decide how much services to provide to an Indian tribe may be influenced to the extent to which the tribe participates in the necessary funding of the services. This is not to say that Indian tribes should pay for services received on a dollar for dollar basis. But a state which provides millions of dollars in services to a tribal reservation should not be preempted, at least in the absence of explicit congressional intent, from imposing a tax on non-Indian taxpayers that has only a minor annd indirect effect on that tribe.

CONCLUSION

For the reasons set forth above it is respectfully submitted that a writ of certiorari should be issued to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE HOOPA VALLEY TRIBE, a federally recognized Indian tribe on its own behalf and on behalf of its enrolled members, and HOOPA VALLEY TIMBER CORPORATION, a tribal enterprise of the Hoopa Valley Tribe,

Plaintiffs/Appellees/ Cross-Appellants,

v.

RICHARD NEVINS, CONWAY H. COLLIN, ERNEST J. DRONENBURG, WILLIAM F. BENNETT, and KENNETH CORY, as members of the California State Board of Equalization; CALIFORNIA STATE BOARD OF EQUALIZATION; and STATE OF CALIFORNIA,

Defendants/Appellants/ Cross-Appellees.

Nos. 88-1560
88-1662

D.C. No.
CV-82-5903-MHP

OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

Argued and Submitted
June 8, 1989—San Francisco, California

Filed July 28, 1989

Before: Jerome Farris, David R. Thompson and Stephen S. Trott, Circuit Judges.

Opinion by Judge Farris

SUMMARY

Indians/Taxation

Affirming the district court's granting of partial summary judgment, the court held that California's timber yield tax against purchasers of tribal timber is preempted by federal law.

Plaintiff the Hoopa Valley Indian Tribe, because of the remoteness of the reservation, relies almost exclusively upon timber-related revenues for supporting the tribal budget. After California modified its ad valorem tax relating to timber and replaced it with the timber yield tax, assessed at harvest time and imposed on the first non-exempt entity to acquire ownership of the timber, the tribe filed suit. The tribe challenged the application of the timber yield tax to private companies who purchase timber from the Hoopa Timber Corp. or from the Bureau of Indian Affairs who provide management for tribal timber. The district court granted partial summary judgment to the tribe on the grounds of federal preemption but did not address the tribe's alternative argument that the tax was invalid because it infringed on tribal sovereignty.

[1] Preemption analysis in Indian tribal cases requires a particularized examination of the relevant state, federal, and tribal interests. If the state law interferes with the purpose or operation of a federal policy regarding tribal interests, it is preempted. [2] Federal laws and policies support and regulate the harvest of timber on tribal lands. [3] State taxes or regulations that interfere with tribal activities may be preempted if the tribal activity involves goods produced on Indian lands. [4] To be valid, the California tax must bear some relation-

ship to the activity being taxed. Showing that the tax serves legitimate state interests, such as raising revenues for services used by tribal residents and others, is not enough. The state's general interest in revenue collection is insufficient to outweigh the specific federal and tribal interest with which the timber yield tax interferes. [5] The purpose of the timber yield tax bears no relationship to tribal timber. [6] Because the timber yield tax does not fund services that directly relate to the harvesting of tribal timber and is otherwise unconnected with tribal timber activities, the timber yield tax is preempted. [7] The tribe argued also that its claim for infringement of its right to tribal self-government entitled it to attorney's fees. The right to self-government qualifies as a substantial claim, [8] but it is not specifically grounded in the Constitution or federal statutes. [9] The right to tribal self-government also is based on treaty, and the court has held previously that a suit based on interpretation of treaty rights is not cognizable under 42 U.S.C. § 1983. The court affirmed the denial of attorney's fees.

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OPINION

FARRIS, Circuit Judge:

The California State Board of Equalization appeals the district court's grant of summary judgment in favor of the

Hoopa Valley Tribe. The district court held that federal law preempts the imposition of the California timber yield tax, Cal. Rev. & Tax Code part 18.5, on the harvest by non-Indian purchasers of timber owned by tribe. The Hoopa Valley Tribe appeals the district court's denial of its motion for attorney's fees. We affirm both determinations.

BACKGROUND

A. *The Tribe*

The Hoopa Valley Indian Reservation, the ancestral home of the Hoopa Valley Tribe, was established in 1864 and is the largest and most populous in California. *See* 8 Smithsonian Institution, *Handbook of North American Indians* 164-76 (W. Sturtevant ed. 1978); 1 Kappler 815 (1904) (executive orders); 13 Stat. 39 (1864). The reservation is located in Humboldt County, approximately 60 miles northeast of Eureka between the Coast Ranges and the Salmon-Trinity Alps Wilderness Area. This litigation concerns the portion of the reservation known as "the Square," an area approximately 12 miles on a side containing prime timber lands of pine, cedar, and Douglas fir. *See Handbook*, *supra*, at 176. Out of the 88,666 acres in the Square, title to 85,430 acres is held in trust for the tribe by the United States. Virtually all of that land is commercial timber land. An additional 600 acres of privately-owned land within the Square contains commercial timber. *Id.*

The remoteness of the reservation and the destruction of fish resources in the Klamath-Trinity River system limit tribal employment opportunities to the timber industry. The tribe relies almost exclusively on timber-related revenues for supporting the tribal budget. *See id.* The tribe established the Hoopa Timber Corp. in 1976 to improve the tribe's economic return from tribal timber resources. The corporation is neither a tribal nor a state corporation. Instead, it is a wholly-owned subordinate organization of the tribe, established

under Art. IX, § 1(p) of the tribal constitution. Management of tribal timber is provided by staff of the U.S. Bureau of Indian Affairs. *See* 25 C.F.R. part 163. The BIA sells tribal timber by competitive bidding to both the Hoopa Valley Timber Corp., which in turn processes the timber and sells it to off-reservation companies, and to private companies. Standard timber industry practice is for the timber owner to bear the economic burden of timber taxes imposed on timber purchasers.

The population of the Hoopa Valley Reservation is approximately 60% Indian and 40% non-Indian. The tribe has approximately 1,650 members. The tribe, county, state, and federal government all fund public services for the reservation. The state maintains State Highway No. 96, the principal route to and through the reservation, which also serves several towns to the north of the reservation. The county maintains 16 miles of road within the reservation. The tribe and the Bureau of Indian Affairs fund fire protection, education, public utilities, subsidized housing, recreational, and economic development programs and maintain 427 miles of local roads. The state and the tribe share the costs of local law enforcement. Welfare and health care costs are shared by the state, the federal government, and the tribe.

B. *The Tax*

In California, all real property, with certain exceptions, is subject to an ad valorem property tax. Cal. Const. art. VIII, § 1; *see also* Cal.Rev. ¶ Tax Code § 104. To promote sound timber management, conservation, and production, in 1976 the state modified the ad valorem tax as it applied to timber and replaced it with a yield and reserves tax, collectively known as the timber yield tax. Cal. Rev. & Tax Code §§ 38101-38908 (timber reserves tax repealed by 1982 Cal. Stat., Ch. 1058); *see generally* W. Unkel & D. Cromwell, *California's Timber Yield Tax*, 6 Ecology L.Q. 831 (1978). The yield tax is assessed at the time of harvest on the value of

timber at the time of harvest and is imposed on the first entity to acquire ownership of felled timber. Cal. Rev. & Tax Code § 38104-38110. If the first owner is exempt from taxation, the timber yield tax is due from the first non-exempt person to acquire legal or beneficial title to the timber. § 38104; Cal. Adm. Code Pub. Rev. R. 1026.

C. *Procedural History*

The tribe filed suit in October 1982, challenging the application of the tax both to private companies who purchase tribal timber directly from the BIA and to private companies who buy from Hoopa Timber Corp. or other Indian-owned firms. The district court granted partial summary judgment to the tribe on the grounds of federal preemption.[1] *Hoopa Valley Tribe v. Nevins*, 590 F.Supp. 198, 199 (N.D. Cal. 1984). The court did not address the tribe's alternative argument, that the tax was invalid because it infringed tribal sovereignty. *Id.* On December 30, 1987, the district court entered final judgment, awarding the tribe $368,659.15 in damages, the stipulated total of timber taxes on tribal timber collected by the state from 1977-82, and $249,016.32 in pre-judgment interest.

DISCUSSION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1362. We have jurisdiction under 28 U.S.C. § 1291. The federal jurisdictional barrier to suits challenging state taxes imposed by 28 U.S.C. § 1341 does not bar such suits by Indian tribes. *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, 470-75 (1976).

We review de novo the district court's grant of summary judgment. *Harkins Amusement Enter. v. General Cinema*

[1]The tribe moved for partial summary judgment on its preemption and tribal sovereignty claims.

Corp., 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 817 (1989). We review the district court's denial of attorney's fees under § 1988 for abuse of discretion; however, we review de novo the legal principles the district court relied upon for its decision. *Lewis v. Anderson*, 692 F.2d 1267, 1269 (9th Cir. 1982).

A. *Validity of the Tax*

The district court found "that the exercise of state authority in assessing the timber yield tax against companies which purchase Tribal timber from BIA or from HTC or other Indian-owned firms is preempted by the pervasive federal regulation of Indian timber and is thus in violation of federal law." *Hoopa Valley*, 590 F. Supp. at 203. On appeal, California argues that its interest in imposing the tax outweighs the federal and tribal interests at issue.

[1] Preemption analysis in Indian tribal cases "requires a particularized examination of the relevant state, federal, and tribal interests." *Cotton Petroleum Corp. v. New Mexico*, 109 S. Ct. 1698, 1707 (1989) (quoting *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 838 (1982)). The question of whether federal law, which reflects related federal and tribal interests, preempts state activity is not controlled by the standards of preemption developed in other areas. *Id.* Ambiguities in federal law are to be construed generously in favor of the tribe; no specific congressional intention to preempt state activity is required. *Id.*; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980); *accord Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898 (9th Cir. 1987), *aff'd*, 108 S. Ct. 685 (1988). If the state law interferes with the purpose or operation of a federal policy regarding tribal interests, it is preempted. *Crow Tribe*, 819 F.2d at 898.

[2] Indian lands are exempt from state real property taxes. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866); *see McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164,

169-71 (1973). Federal policy encourages the economic development of tribal lands. *White Mountain*, 448 U.S. at 143. Federal laws and policies comprehensively support and regulate the harvest of timber on tribal lands. *Id.* at 145-49.

[3] State taxes or regulations that interfere with tribal activities may be preeempted if the tribal activity the state seeks to affect involves goods produced on the reservation. *Compare Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (upholding state tax on on-reservation sales of cigarettes to non-Indians because product obtained off-reservation) *with California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987) (state regulation of bingo games preempted because tribe was generating value on reservation through activities in which tribe had strong interest). In *White Mountain*, Arizona applied its motor carrier license and fuel taxes to the equipment and activities of a private contractor hired by the tribe to assist in harvesting timber on reservation lands. 448 U.S. at 139-40. The Court found those taxes preempted because they undermined the federal policy of assuring that timber sale profits inure to the tribe. *Id.* at 148-49. In *Ramah*, New Mexico imposed a tax on the gross receipts that a non-Indian construction company received from a tribal school board for the construction of a school for Indian children on the reservation. 458 U.S. at 834. Although the tax was paid by a private company, the Court found the tax preempted because it burdened the comprehensive federal scheme regulating education for Indian children. *Id.* at 845.

In *Crow Tribe*, we invalidated Montana's coal severance tax as applied to coal mined from tribal lands because the tax had a financial impact on tribal resource development activities. 819 F.2d at 899-900. Montana argued that its severance tax on coal did not burden the tribe's economic interests because the tax was imposed on the tribe's lessee, a private company, and not the tribe. 819 F.2d at 899. We rejected the

argument because the taxes ultimately reduced the royalty received by the tribe.[2] *Id.*

In *Cotton Petroleum* the Court reaffirmed the basic principles of *White Mountain* and *Ramah* while holding that New Mexico could impose its oil and gas severance tax on the production of oil and gas by non-Indians from tribal lands. 109 S. Ct. at 1711-13. The Court distinguished *White Mountain* and *Ramah* by recognizing that New Mexico regulated the oil and gas activities affected by the tax. *Cotton*, 109 S. Ct. at 1712. Additionally, the Court noted that the New Mexico tax primarily burdened non-Indian taxpayers. *Cotton*, 109 S. Ct. at 1712-13 & n.18. "This is not a case in which the State has had nothing to do with the on-reservation activity, save tax it. Nor is this a case in which an unusually large state tax has imposed a substantial burden on the tribe." *Cotton*, 109 S. Ct. at 1713. The Court also noted that it had no reason to reexamine its summary affirmance of our decision in *Crow Tribe*, because the Montana tax "had a negative effect on the marketability of coal produced in Montana." 109 S. Ct. at 1713 n.17. In contrast to New Mexico's regulation of oil and gas in *Cotton*, California plays no role in the Hoopa Valley Tribe's timber activities. *Hoopa*, 590 F. Supp. at 201-02. Also unlike *Cotton*, the burden of the tax concededly falls on the tribe. *Hoopa*, 590 F. Supp. at 201 n.2.

The state argues that the district court erred because its interest in imposing the tax is much stronger than Arizona's interest in *White Mountain*. The state points out that in *White Mountain*, Arizona imposed motor vehicle taxes on entities that used reservation roads maintained by the BIA

[2] *Crow Tribe* supports one of the key underpinnings of the district court's decision in this case. California argued that the tax should not be preeempted because it did not affect activity conducted on the reservation, but instead fell on ownership of cut timber once title transfered to a non-Indian. The district court noted that this is "a distinction without a difference." *Hoopa Valley*, 590 F. Supp. at 201.

and not the state. Here, California notes that the timber tax helps fund various services used by tribal members, and that the services provided by the state to tribal members far exceed the income from the timber tax.

[4] The district court correctly determined that the state's interest was not strong enough to outweigh the substantial federal and tribal interests in timber harvesting on the reservation. The Supreme Court rejected a parallel argument in *Ramah*: "We are similarly unpersuaded by the State's argument that the significant services it provides to the Ramah Navajo Indians justify the imposition of this tax. The State does not suggest these benefits are in any way related to the construction of schools on Indian land." 458 U.S. at 845 n.10; *see also White Mountain*, 448 U.S. at 150 ("We do not believe that respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber."). Although California points to a variety of services that it provides to residents of the reservation and the surrounding area, none of those services is connected with the timber activities directly affected by the tax. To be valid, the California tax must bear some relationship to the activity being taxed. *See Crow Tribe*, 819 F.2d at 900. Showing that the tax serves legitimate state interests, such as raising revenues for services used by tribal residents and others, is not enough. *Id.* at 901. "To the extent that this [coal severance] tax is not related to the actual governmental costs associated with the mining of the Indian coal . . . the state's interest in acquiring revenues is weak in comparison with the Tribe's right to the bounty from its own land." *Crow Tribe v. Montana*, 650 F.2d at 1117 (citations omitted).

[5] The state's general interest in revenue collection is insufficient to outweigh the specific federal and tribal interests with which the timber yield tax interferes. The services provided by the state and county are provided to all residents. The road, law enforcement, welfare, and health care services

provided by the state and county benefit both tribal and non-tribal members. California admits that there is no direct connection between revenues from the timber yield tax and the provision of services to tribal members or area residents generally.

[6] The purpose of the timber yield tax bears no relationship to tribal timber. Prior to enactment of the timber yield tax, the state imposed an ad valorem tax on timber. Tribal timber was not subject to the tax. Recognition of the disincentives to proper timber management created by the ad valorem tax led to the enactment of the timber yield tax. *See* Unkel & Cromwell, *supra*, at 832-38. Those concerns were not relevant to tribal timber, because that timber was not subject to the ad valorem tax and was managed under detailed guidelines by the BIA. *See* Comment, *Challenging the Assessment of the California's Timber Yield Tax Against Purchasers of Indian Timber*, 13 Pac. L.J. 1325, 1327-30 (1982).

[7] Because the timber yield tax does not fund services that directly relate to the harvesting of tribal timber and is otherwise unconnected with tribal timber activities, the timber yield tax should be preempted.

B. *Attorney's Fees*

[8] A more difficult question is posed by the tribe's request for attorney's fees under 42 U.S.C. § 1988. The district court's decision was based on a preemption analysis, which this court has held is outside the scope of 42 U.S.C. § 1983 and therefore incapable of supporting an award of attorney's fees under § 1988. *See White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848-52 (9th Cir.), *cert. denied*, 479 U.S. 1060 (1987); *accord Central Machinery v. Arizona*, 152 Ariz. 134, 730 P.2d 843, 853-54 (1986), *cert. denied*, 481 U.S. 1042 (1987). Section 1988 fees may be awarded to a prevailing party if that party presented a substantial unadjudicated claim within the scope of § 1983 that was not alleged solely to

support the fee award. *Maher v. Gagne*, 448 U.S. 122, 130-33 (1980). The tribe argues that its claim for infringement of its right to tribal self-government is within the scope of § 1983 and therefore entitles it to attorney's fees.[3] The right to self-government qualifies as a substantial claim, because this court has recognized the right of tribal self-government as an independent basis for finding a state tax invalid. *Crow Tribe*, 819 F.2d at 902-03. The district court held that the tribe's right to self-government "preceded, and therefore is not secured by, any federal statute or the Constitution . . . and therefore is not cognizable under section 1983."

No reported decision settles the issue by determining whether the alleged infringement of the right to tribal self-government is a "deprivation of any rights, privileges or immunities secured by the Constitution or laws." 42 U.S.C. § 1983. Instead, we must analyze whether the right to tribal self-government is within the scope of § 1983. Some federal statutes, as well as constitutional provisions, create rights enforceable by § 1983. *See Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980) (scope of § 1983 encompasses violations of federal statutes); *Ramah Navajo School Board v. Bureau of Revenue*, 104 N.M. 302, 720 P.2d 1243 (App.), *cert. denied*, 470 U.S. 940 (1986) (Indian Self-Determination and Educational Assistance Act created right cognizable under § 1983).

[9] The tribal right of self-government is not grounded specifically in the Constitution or federal statutes. *See* E. Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 Hastings L.J. 189, 90-93 "The tribes do not have a constitutional right to maintain this [sovereign] status, nor do they have a consti-

[3]The right to tribal self-government claim was included in the complaint and briefed for the summary judgment motion. The tribe raises an additional claim, of tax immunity, that it argues is within the scope of § 1983.. This claim fails because the tribe admits it was not even briefed. Nor is the immunity claim distinct from preemption. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149-55 (1973).

tutional right to exercise any powers or attributes of sovereignty." *Id.* at 135. Instead, the right to tribal self-government is protected by treaty and federal judicial decisions. *Id.* at 91-93. "[T]he Constitution does not require continuing recognition of tribes as governmental entities [and] the treaty clause has come to be the source of federal legislative power over Indian affairs." *Id.* at 93; *see also* F. Cohen, *Handbook of Federal Indian Law* 231-35 (1982).

In refusing to award § 1988 fees for the preemption claim in *White Mountain*, this circuit stated that "§ 1983 was not intended to encompass those Constitutional provisions which allocate power between the state and federal government." *White Mountain*, 810 F.2d at 848. The question is whether the right to tribal self-government is one "that protects the individual against government intrusion." *Id.* In *White Mountain*, we distinguished power conferring provisions, such as the Supremacy Clause, from rights conferring provisions that protect the individual from government intrusion. *Id.*

Like the right to be free from state taxes preempted by federal law, the right to self-government is best characterized as a power, rather than a right. It enables a tribe to exercise powers as a sovereign, within the limitations provided by federal law. For example, tribes may determine their own form of government and membership, regulate hunting and fishing on reservations, regulate and tax resource development activities on tribal lands, decide criminal and civil disputes involving tribal members and civil disputes between tribal and non-tribal members. *See* Cohen, *supra*, at 246-57; L. Tribe, *American Constitutional Law* 1471 n.29 (1988) (citing cases). The tribe is asserting its right to exercise sovereignty, as opposed to protecting the personal liberty of its members. *See White Mountain*, 810 F.2d at 848. Because the right to tribal

government protects the powers conferred upon the tribe, and not individual rights, it falls outside the scope of § 1983.[4]

The right to tribal self-government is protected in part by federal judicial decisions. The tribe argues that because the right to tribal self-government is found within federal common law it is within the scope of § 1983. In support of that proposition, the tribe cites cases holding that 28 U.S.C. § 1331, the federal jurisdiction statute, encompasses federal common law. The scope of § 1983 does not parallel that of 28 U.S.C. § 1331. *See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (§ 1983 claim precluded if Congress includes within statutory scheme comprehensive remedial procedures); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) ("bill of rights" provision of Developmentally Disabled Assistance and Bill of Rights Act essentially precatory and therefore unenforceable under § 1983). Although § 1983 is to be construed liberally, the tribe can point to no cases that support incorporating federal common law into its scope.

We understand, but reject, the tribe's argument that the Act of April 8, 1864, 13 Stat. 39, is a federal law within the scope of § 1983. The Act merely authorized the creation of reservations in California and did not address the sovereignty or rights of Indians.[5]

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[4]The Supreme Court has characterized the right of tribal self-government as independent of but related to preeemption analysis. *White Mountain*, 448 U.S. at 143. The right of self-government also provides "an important 'backdrop' " to preeemption analysis. *Id.* (quoting *McClanahan*, 411 U.S. at 172). The Court has chosen not to ground its analyses of conflicts between state laws and tribal activities in the Constitution's Indian Commerce Clause, prefering to rely on the preeemption approach described above. *Ramah*, 458 U.S. at 845-46.

[5]In *White Mountain*, we held that the statutes regulating the harvest of tribal timber and federal policies concerning tribal timber development were not within the scope of § 1983. 810 F.2d at 852.

[10] The right to tribal self-government also is based on treaty. We previously have held that a suit based on the interpretation of treaty rights to take fish is not cognizable under § 1983. *United States v. Washington*, 813 F.2d 1020 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1593 (1988). The right to self-government may appear more akin to a § 1983-type civil right than the right to take fish. Nonetheless, both rights are grounded in treaties, as opposed to specific federal statutes or the Constitution.

CONCLUSION

We affirm the district court's determination that the assessment of the California timber yield tax against purchasers of tribal timber is preeempted by federal law. We also affirm the district court's denial of § 1988 attorney's fees to the tribe on the grounds that the tribe's claims were not cognizable under § 1983.

AFFIRMED. Each party shall bear its own costs of appeal.

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Appendix B

The HOOPA VALLEY TRIBE, a federally recognized Indian tribe, in its own behalf of its enrolled members; the Hoopa Timber Corporation, a tribal enterprise of the Hoopa Valley Tribe, Planitiffs,

v.

Richard NEVINS, Conway H. Collis, Ernest J. Dronenburg, Jr., Kenneth Cory, William M. Bennett, Members, State Board of Equalization; California State Board of Equalization; State of California, Defendants.

No. C-82-5903-MHP.

United States District Court,
N.D. California.

OPINION

PATEL, District Judge.

INTRODUCTION

This action is before the court on cross-motions for partial summary judgment. Oral argument was heard on the matter on March 5, 1984. After having considered all memoranda submitted by the parties and the arguments of counsel, the court concludes for the reasons set forth below that plaintiffs' motion for partial summary must be granted, and defendants' motion denied.

FACTUAL BACKGROUND

Plaintiffs are the Hoopa Valley Tribe ("Tribe") and the Hoopa Timber Corporation ("HTC"), a wholly-owned enterprise of the Tribe. Defendants are the California State Board of Equalization ("Board"), five individual members of the Board, and the State of California. Planitiffs challenge application of the timber yield tax and the timber reserve fund tax established by the 1976 California Forest Taxation Reform Act (Cal.Rev. & Tax.Code §§ 38101-38908), which are levied on "timber owners" against the value of timber at the time of harvest. Both taxes are referred to in this opionion as "the timber yield tax" or "the tax". The

timber reserve fund tax was repealed in 1982. 1982 Cal.Stat., Ch. 1058.

Timber on the reservation is held in trust for the Tribe by the United States and is sold annually by the Bureau of Indian Affairs ("BIA") through competitive bidding. When HTC is the successful bidder it buys from BIA and after processing the timber sells to off-reservation companies. On its face the timber yield tax applies to private companies who buy directly from BIA. Cal.Rev. & Tax.Code § 38104 provides that "timber owner" includes "the first person who acquires either the legal title or beneficial title to timber after it has been felled from land owned by a federal agency or any other person or agency or entity exempt from property taxation under the Constitution or laws of the United States . . . ." Defendants have not attempted to assess the tax directly against HTC or other Indian-owned firms when they are the successful bidders who purchase from BIA. However, the Board, which is charged with enforcing the tax, has ruled that the tax applies to purchases by private companies from HTC or other Indian-owned firms. A property tax rule has defined "timber owner" as "the first non-exempt person" who "acquires either the legal title or beneficial title to timber after it has been felled." Cal.Admin.Code Pub.Rev.R. 1026 (1980).

Plaintiffs challenge the application of the tax both to private companies who buy directly from BIA and to private companies who buy from HTC or other Indian-owned firms, on grounds of federal preeemption and infringement of tribal sovereignty. Because the court concludes that the state tax is preempted by federal law, it does not reach the issue of tribal sovereignty.

DISCUSSION

The parties agreed at oral argument that the analysis of this case must be guided by the Supreme Court's decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980)[1] In *White Mountain* the court held that

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[1] The court notes with some astonishment that defendants failed even to cite *White Mountain*, or any other case relied on by plaintiffs, in their moving papers. In view of the obvious relevanace of *White Mountain*

motor carrier and use fuel taxes imposed by Arizona on a non-Indian logging company operating on an Indian reservation were invalid because preempted by federal law. The Court determined that either preemption by federal law or infringement on tribal sovereignty could bar the application of state law to activity on the reservation or by tribal members. *Id.* at 142-43, 100 S.Ct. at 2582-83. Emphasizing that preemption standards which have been developed in other areas are unhelpful in analyzing preemption as it relates to Indian tribes, the Court called for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145, 100 S.Ct. at 2584.

Using this as the framework, the Court then examined in detail the extent of the federal government's regulation of the harvesting of Indian timber and concluded that it was comprehensive, with the BIA exercising "literally daily supervision over the harvesting and management of tribal timber." *Id.* at 147, 100 S.Ct. at 2585. The Court also concluded that the federal government exercised detailed supervision over BIA roads on the reservation. Finding the federal regulatory scheme prevasive, the Court concluded that assessment of state taxes would obstruct federal policies and that defendants had identified no service performed by the state that would justify assessment of taxes for activities on BIA and tribal roads. *Id.* at 148-49, 100 S.Ct at 2586-87.

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and the other cases, there is no excuse for defendants' attempt to skirt the issues they raise. Defendant's reliance in their moving papers on *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949) is spurious. Not only was no Indian tribe a party in *Oklahoma Tax Commission*, but the Court in no way considered Indian interests and in fact noted that there was no possibility the economic incidence of the tax could fall on the tribe. *Id.* at 353, 69 S.Ct. at 567. This 1949 case which did not even discuss the analysis to be applied when a state tax burdens an Indian tribe has no application to the case at bar and other cases cited by defendants obviously cannot insulate defendants from the anlaysis mandated by *White Mountain* and other recent cases.

The Court identified several ways in which the taxes would obstruct federal policy. First:

> At the most general level, the taxes would threaten the overriding federal objective of guaranteeing Indians that they will "receive . . . the benefit of whatever profit [the forest] is capable of yielding . . ." 25 C.F.R. § 141.3(a)(3)(1979). Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the Federal Government . . . The imposition of the taxes at issue would undermine that policy in a context in which the Federal Government has undertaken to regulate the most minute details of timber production and expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber.

Id. at 149, 100 S.Ct. at 2586. Second, the Court found that "the taxes would undermine the Secretary's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber." *Id.* Finally, the Court concluded that "the imposition of state taxes would adversely affect the Tribe's ability to comply with the sustained-yield management policies imposed by federal law." *Id.* at 149-50, 100 S.Ct. at 2586-87. The Court noted, in concluding, that it was "undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe." *Id.* at 151, 100 S.Ct. at 2587.

The case before this Court bears many similarities in the situation in *White Mountain*. The taxes here were also imposed on non-Indian companies, the identical federal regulations governing the harvesting of Indian timber are implicated, and the effect of the tax is to diminish the profit the Tribe would otherwise gain from the sale of its timber.[2] Plaintiffs assert, and

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[2] Defendants concede that the economic burden of the taxes falls at least in part on the Tribe, although the parties disagree as to the extent to which the burden is passed on to the Tribe. (Stipulation of Facts at 71-72).

defendants do not deny, that the day-to-day supervision of tribal timber on the Hoopa reservation by BIA is just as, if not more, extensive than in *White Mountain*. For example, the BIA established minimum stumpage bid prices, and both the federal government and the Tribe expend large sums each year for timber management and timber sales administration. Defendants concede that neither the State of California nor Humboldt County exercises any regulatory jurisdiction or management over tribal timber and that they expend no unreimbursed funds on tribal timber. (Stipulation of Facts at 55-56.)

Applying the analysis mandated in *White Mountain*, this court must conduct a particularized inquiry into the state, federal, and tribal interests at stake. The federal and tribal interests at issue are identical to those in *White Mountain*, and the ways in which the state tax would obstruct federal policies is also the same. Defendants argue that the tax here does not fall under *White Mountain* because it is not a tax on activity conducted on the reservation, but rather is on ownership of felled timber once title has transferred to a non-Indian. This is a distinction without a difference; the nature of the federal and tribal interests remains the same, as does the existence of a comprehensive federal scheme of regulation with which the state tax interferes.[3]

In fact, the impact on the federal regulatory scheme is even greater here than in *White Mountain* because the tax at issue is assessed against the very subject of the regulations—the Indian timber harvested on the reservation. Moreover, the value of the timber is produced entirely on the reservation. The Supreme Court has recently reaffirmed the importance of the concept that a tribe is entitled to the benefit, free of state taxation, of resources

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[3] Defendants' arguments that *White Mountain* is inapplicable because the private companies upon whom the tax is directly assessed conduct most of their business off the reservation and thus benefit from a full range of state and county services was rejected outright in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 843-44 & n. 9, 102 S.Ct. 3394, 3401-02 & n. 9, 73 L.Ed.2d 1174 (1982), as defendants concede. There is thus no need for the court to address this argument.

whose value is produced on the reservation. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983); *see also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-57, 100 S.Ct. 2069, 2590-91, 65 L.Ed.2d 10 (1980). The tax here implicates, as did the tax in *White Mountain*, the Tribe's right to " 'receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . . ' " *White Mountain*, 448 U.S. at 149, 100 S.Ct. at 2586, *quoting* 25 C.F.R. § 141.3(a)(3) (1979). The fact that the tax does not attach until the timber is sold to a non-Indian does not result in a different analysis.

The state has two possible interests in the tax at issue: a regulatory interest and a revenue interest. The regulatory intent of the statute is clear. The legislative policy underlying the statute included encouraging "prudent and responsible forest resource management calculated to serve the public's need for timber and other forest products, while giving consideration to the public's need for watershed protection, fisheries and wildlife, and recreational opportunities alike in this and future generations." Cal.Rev. & Tax.Code § 38101, Historical Note, Section 1(c) (West 1979). It is clear, however, that the state can have no interest in regulating tribal timber. Faced with a similar situation, in which the state of Montana attempted to impose upon non-Indians who mined coal from Indian trust land a tax with comparable regulatory purposes, the Ninth Circuit concluded that "[t]his coal is not the state's to regulate, and assertion of such authority diminishes the Tribe's own power to regulate. Such state action conflicts with the 1938 Act's purpose of allowing tribes to control the development of their mineral resources." *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1114 (9th Cir.1981), *modified*, 665 F.2d 1390, *cert. denied*, 459 U.S. 916, 103 S.Ct. 230, 74 L.Ed.2d 182 (1982). Not only does the state have no legitimate regulatory interest in Indian timber, but the stated regulatory intent of the timber yield tax brings it into even greater conflict with the federal regulatory scheme than was the case in *White Mountain*. Imposition of the tax directly interferes with the comprehensive Federal timber management and timber sales administration.

The state's only real interest, then, is in collecting revenues. The justification proffered by the state for the burden imposed on the Tribe by this tax is that the state provides the Tribe with various valuable services. The Supreme Court has, however, made it clear what state benefits can justify a state tax burden on an Indian tribe. Such a burden will be upheld only if the tax revenue is used to aid the on-reservation activity which is being taxed.

The Supreme Court rejected precisely the same argument put forth by defendants here in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982). In that case the Court struck down a tax imposed by the state on the gross receipts received by a non-Indian construction company from a tribal school board for the construction of a school for Indian children on the reservation. The Court wrote:

> We are similarly unpersuaded by the State's argument that the significant services it provides to the Ramah Navajo Indians justify the imposition of this tax. The State does not suggest that these benefits are in any way related to the construction of schools on Indian land. Furthermore, the evidence introduced below by the State on this issue is far from clear. Although the State does provide services to the Ramah Navajo Indians, it receives federal funds for providing some of these services, and the State conceded at trial that it saves approximately $380,000 by not having to provide education for the Ramah Navajo children.

458 U.S. at 845 n. 10, 102 S.Ct. at 3402 n. 10.

Defendant's argument that the state in *Ramah Navajo* merely failed to prove that it provided significant services to the Indians is contradicted by the Supreme Court's subsequent decision in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. ____, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983). There the Court, in enjoining the state from enforcing state game laws against non-Indians for acts done on the reservation, observed that the state had identified "no services it has performed in connection with hunting and fishing by nonmembers" which would justify a game license tax. The

Court concluded that the state's "general desire to obtain revenues is simply inadequate to justify the assertion of concurrent jurisdiction in this case." 462 U.S. ____, 103 S.Ct. at 2391.

Finally, the Ninth Circuit had come to the same conclusion even earlier. In *Crow Tribe v. Montana*, involving a state attempt to tax coal mined from Indian trust land, as discussed above, the court considered that one main purpose of the tax at issue was to preserve the value of the coal for future generations. In rejecting the state's attempt to impose a tax, the court concluded: "To the extent that this tax is not related to the actual governmental costs associated with the mining of the Indian coal, . . . the state's interest in acquiring revenues is weak in comparison with the Tribe's right to the bounty from its own land." 650 F.2d 1117 (cites omitted).[4]

In light of the Supreme Court's statements in *Ramah Navajo* and *Mescalero Apache Tribe*, and the Ninth Circuit's opinion in *Crow Tribe*, defendants cannot rely on general services provided to the Tribe to justify this tax.[5] Revenues from the timber yield tax go into a general fund and in no way support development of Indian timber. As noted above, the state has stipulated that it

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[4] Defendants' attempt to rely on *Crow Tribe* to support their own position is misplaced. The court's remark that "[a] tax carefully tailored to effectuate the state's legitimate interests might survive," 650 F.2d at 1114, was made in the context of detailed examples given by the court of governmental costs associated with the mining itself, which the state could have perhaps tried to recover through a tax tailored to *those costs*.

[5] Defendants argue that the Supreme Court in *White Mountain* "accepted" the state's taxation of the use of state highways within the reservation, and that because those tax revenues were not used to develop Indian timber, taxes on any on-reservation activity must be acceptable if other general services are provided. The short response to this argument is that the Supreme Court in *White Mountain* never addressed the state's taxation of state highway use at all. The Court clearly stated that for purposes of that action petitioners had conceded liability for taxes attributable to use of state highways within the reservation. 448 U.S. at 140 n. 6, 100 S.Ct. at 2582 n. 6. Those taxes were never challenged and were never at issue. No inference can be drawn from a matter which was not before the Court.

expends no reimbursed state funds with respect to timber or timber lands inside the reservation. Thus, the state's general interest in collecting revenue is insufficient when weighed against the federal and tribal interests at stake, under the *White Mountain* analysis.[6]

CONCLUSION

Having conducted the particularized inquiry into the nature of the state, federal, and tribal interests at stake as prescribed by the Supreme Court, the court finds that the exercise of state authority in assessing the timber yield tax against companies which purchase Tribal timber from BIA or from HTC or other Indian-owned firms is preempted by the pervasive federal regulation of Indian timber and is thus in violation of federal law.

Accordingly,

IT IS ORDERED that plaintiffs' motion for partial summary judgment be GRANTED and that defendants' motion for partial summary judgment be DENIED.

IT IS FURTHER ORDERED that the parties shall submit within thirty (30) days a joint statement as to the issues which remain to be resolved and how they intend to proceed with respect to any remaining issues. A status conference will be held in this matter on August 27 at 9:30 A.M.

ORDER

Plaintiffs and defendants in this action have proposed certain changes to the opinion issued by this court on July 6, 1984. Defendants have not opposed plaintiffs' proposed changes, all of which relate to technical points and make no substantive changes in the opinion.

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[6] The court notes defendants' argument that the county will have no incentive to provide services to the Tribe if the Tribe does not sufficiently contribute to revenues is contrary to a line of California cases beginning with *Serrano v. Priest*, 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929 (1976). In light of the court's conclusion based on *White Mountain* and subsequent cases, the court need not reach this issue.

Defendants also propose two changes. They first propose that on p. 199, line 45, the words "The parties agreed at oral argument that" be deleted. The court has compared its own recollection with the transcript as read back by the reporter and finds that defendants' counsel stated at oral argument: "We will accept that the *Bracker* and *White Mountain* [sic] is the analysis that applies." The court therefore finds it inappropriate to modify the opinion in this respect.

Defendants' second proposed change is to delete the first two sentences of footnote 1, on page 200. Because the court found it clear that the case must be governed by *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), and further determined that the three Ninth Circuit decisions which defendants complain were not cited by plaintiffs were inapposite, it finds it inappropriate to modify the opinion in this respect, as well.

For these reasons, both of defendants' proposed changes are DENIED.

Defendants have further requested that the court certify this matter for an interlocutory appeal. However, the requirements for such certification under 28 U.S.C. § 1292(b) include that the district court "shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion . . . ." The court being of the opinion that the legal issues in this matter are clear and that there is not substantial ground for difference of opinion, the request that the court certify for interlocutory appeal is DENIED.

IT IS SO ORDERED.

Appendix C

The United States Constitution, Article VI.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . .

Appendix D

25 CFR Part 163—General Forest Regulations

§ 163.1 Definitions.

"Approval" means authorization by the Secretary, Area Director, Superintendent, tribe or individual Indian in accordance with appropriate delegations of authority.

"Commercial forest land" means Indian forest land capable of bearing merchantable forest products, currently or prospectively accessible, and not withdrawn from such use.

"Commercial forest resources" includes all the benefits derived by man from commercial forest lands such as forest products, soil productivity, water, fisheries, wildlife, recreation, aesthetic and other traditional values of the forest.

"Forest products" includes major forest resources such as lumber, lath, crating, ties, bolts, logs, bark, pulpwood, fuelwood, posts, Christmas trees, split products or other marketable materials authorized for removal.

"Forest protection" includes the protection of Indian forest resources from damages and losses by disease, insects, fire, animals (domestic and wild) and trespass. It also includes protection of wild lands from fire.

"Indian forest lands" means lands held in trust by the United States for Indian tribes, individual Indians, or Alaskan Natives or lands which are owned by such tribes and individuals subject to restrictions against alienation. Such lands are considered chiefly valuable for the production of forest products or to maintain watershed or other land values enhanced by a forest cover. A formal inspection and land classification action is not required before applying the provisions of this part to the management of any particular tract of land.

"Secretary" means the Secretary of the Interior or his/her authorized representative.

"Stumpage rate" means the stumpage value per thousand board feet or other unit of measure.

"Stumpage value" means the value of uncut timber as it stands in the woods.

"Sustained yield" means the yield of forest products that a forest can produce continuously at a given intensity of management.

§ 163.2 Scope and information collection.

(a) The regulations in this part are applicable to all Indian forest lands except as this part may be superseded by special legislation.

(b) The information collection requirements contained in §§ 163.6(a), 163.7(c)(2), 163.8(a), 163.9(a), 163.10(d), 163.14, 163.19(a), 163.19(d), and 163.23 have been approved by the Office of Management and Budget under 44 U.S.C. 3504(h) *et seq.* and assigned clearance number 1076-0080. The information is being collected to properly account for the resource. The information will be used to conduct program planning and management of timber resources. Response is required to obtain or retain a benefit.

§ 163.3 Objectives.

The following objectives apply to the management of Indian forest lands.

(a) The development, maintenance and enhancement of commercial forest lands in perpetually productive state by providing effective management and protection through the application of sound silvicultural and economic principles to the reforestation, growth and harvesting of timber and other forest products. This includes making adequate provision for new forest growth as the timber is removed.

(b) Regulation of the forest resources through the establishment and development of a timber sales program that is supported by written tribal objectives, and a long-range multiple use plan (as included in a forest management plan) that requires sound forest management practices.

(c) The regulation of the commercial forest in a manner which will insure method and order in harvesting the tree capital, so as

to make possible continuous production and a perpetual forest business.

(d) The development of Indian forests by Indian people to promote self-sustaining communities, so that Indians may receive from their own property not only the stumpage value, but also the benefit of whatever labor and profit it is capable of yielding.

(e) The sale of Indian timber on the open market, when the volume available and/or utilized for harvest is in excess of that which is being developed by the local Indian forest enterprise(s).

(f) The preservation of the forest in its natural state whenever the authorized Indian representatives determine that the recreational, cultural, aesthetic, or traditional values of the forest represent the highest and best use of the land to the Indians.

(g) The management and protection of forest resources to retain the beneficial effects of regulating water runoff and minimizing soil erosion.

(h) The management and protection of forest lands to maintain and/or improve timber production, soil productivity, grazing, wildlife, fisheries, recreation, aesthetic, cultural, and other traditional values of the forest to the extent that such action is in the best interest of the Indians.

§ 163.4 Sustained yield management.

To further the objectives enumerated in § 163.3, the timber harvest from Indian forest lands will not be authorized until practical methods of harvest, based on sound economic, silvicultural and other forest management principles, have been prescribed. Harvest schedules shall be directed toward achieving an approximate balance at the earliest practical time, between maximum net growth and harvest, and shall salvage timber that is deteriorating from fire damage, insect infestation, disease, overmaturity or other causes. On all Indian reservations with commercial forest lands, appropriate management and operating plans shall be prepared and revised as needed. Such documents will contain a statement defining the objectives sought and describing the manner in which the policies of the tribe and the Secretary will be applied to the forest, with a definite plan of

silvicultural management, analysis of the short-term and long-term effects of the plan, and a program of action, including a harvest schedule, for a specified period in the future.

§ 163.5 Cutting restrictions.

(a) Harvesting Indian timber will not be permitted unless provisions for natural and/or artificial forestation are included in planning the harvest.

(b) Clearing of large contiguous areas will be permitted only on lands that, when cleared, will be devoted to a more beneficial use than growing timber crops. This restriction shall not prohibit clearcutting when it is silviculturally good practice to harvest a particular stand of timber by such methods and conforms with § 163.3.

§ 163.6 Indian operations.

Indian tribal forest enterprises may be initiated and organized with consent of the authorized tribal representatives. Such enterprises may contract for the purchase of non-Indian owned forest products. Subject to approval by the Secretary the following actions may be taken:

(a) Authorized tribal enterprises may enter into formal agreements with tribal representatives for the use of tribal forest products, and with individual Indian owners for allotted forest products.

(b) Authorized officials of tribal enterprises, operating under approved agreements for the use of tribal or allotted forest products pursuant to this section, may sell the forest products produced according to generally accepted trade practices without compliance with § 3709 of the Revised Statutes.

(c) With the consent of the Indian owners, such enterprises may, without advertisement, contract for the purchase of forest products on Indian lands at stumpage rates authorized by the Secretary.

(d) Determination of and payment for stumpage and/or products utilized by such enterprises will be authorized in accordance

with § 163.15. However, the Secretary may issue special instructions for payment by methods other than those in § 163.15.

(e) Performance bonds may or may not be required in connection with operations on trust lands by such enterprises as determined by the Secretary.

§ 163.7 Timber sales from unallotted and allotted lands.

(a) If the volume of timber available for harvest on a reservation exceeds that being developed and/or utilized by local Indian forest enterprise(s) or individual Indians, open market sales of Indian timber may be authorized. This provision requires consent of the authorized representatives of the tribe for tribal timber, and the owners of a majority Indian interest in trust or restricted timber on allotted lands. Consent of the Secretary is required in all cases.

(b) On any Indian forest lands not formally designated for retention in its natural state by authorized Indian representatives, the Secretary may sell the timber from lands held under a trust or other patent containing restrictions on alienations without the consent of the owners when in his/her judgment such action is necessary to prevent loss of values resulting from fire, insects, diseases, windthrow or other catastrophes.

(c) Unless otherwise authorized by the Secretary, sales of timber from unallotted lands, allotted lands, or a combination of these two ownerships having a stumpage value exceeding $10,000 will not be approved until:

(1) An examination of the timber to be sold has been made by a forest officer, and

(2) A report setting forth all pertinent information has been submitted to the officer authorized to approve the contract as provided in § 163.13. In all such sales the timber shall be appraised and sold at stumpage rates not less than those established by the Secretary.

§ 163.8 Advertisement of sales.

Except as provided in §§ 163.6, 163.7, 163.9, and 163.19 sales of timber shall be made only after advertising.

(a) The advertisement shall be approved by the officer who will approve the contract. Advertised sales shall be made under sealed bids, or at public auction, or under a combination thereof. The advertisement may limit sales of Indian timber to Indian forest enterprises, members of the tribe, or may grant to Indian forest enterprises and/or members of the tribe who submitted bids the right to meet the higher bid of a non-member. If the estimated stumpage value of the timber offered does not exceed $10,000, the advertisement may be made by posters and circular letters. If the estimated stumpage value exceeds $10,000, the advertisement shall also be made in at least one edition of a newspaper of general circulation in the locality where the timber is situated. If the estimated stumpage value does not exceed $50,000, the advertisement shall be made for not less than 15 days; if the estimated stumpage value exceeds $50,000 but not $200,000, for not less than 30 days; and if the estimated stumpage value exceeds $200,000, for not less than 60 days.

(b) The approving officer may reduce the advertising period because of emergencies such as fire, insect attack, blowdown, limitation of time, or when there would be no practical advantage in advertising for the prescribed periods.

(c) If no contract is executed after such advertisement, the approving officer may, within one year from the last day on which bids were to be received as defined in the advertisement, permit the sale of such timber in the open market. The sale will be made upon the terms and conditions in the advertisement and at not less than the advertised value or the appraised value at the time of sale, whichever is greater.

§ 163.9 Timber sales without advertisement.

(a) Sales of timber may be made without advertisement to Indians or non-Indians with the consent of the authorized representatives of the tribe for tribal timber or with the consent of the owners of a majority Indian interest in trust or restricted timber on allotted lands, and the approval of the Secretary when:

(1) The timber is to be cut in conjunction with the granting of a right-of-way;

(2) Granting an authorized occupancy;

(3) It must be cut to protect the forest from injury;

(4) It is impractical to secure competition by formal advertising procedures; or

(5) Otherwise specifically authorized by statutes or regulations.

(b) The approving officer shall establish a documented record of each negotiated transaction. This will include:

(1) A written determination and finding that the transaction is of a type or class allowing the negotiation procedures or warranting departure from the procedures provided in § 163.8;

(2) The extent of solicitation and competition, or a statement of the facts upon which a finding of impracticability of securing competition is based; and

(3) A statement of the factors on which the award is based, including a determination as to the reasonability of the price accepted.

(c) This section shall not serve to impede the use of § 163.6 as approved by the Secretary.

§ 163.10 Deposit with bid.

(a) A deposit shall be made with each proposal for the purchase of either allotted or unallotted Indian timber. Such deposits shall be at least:

(1) Ten (10) percent if the appraised stumpage value is less than $100,000 and in any event not less than $1,000 or full value whichever is less;

(2) Five (5) percent if the appraised stumpage value is $100,000 to $250,000 but in any event not less than $10,000.

(3) Three (3) percent if the appraised stumpage value exceeds $250,000 but in any event not less than $12,500.

(b) Deposits shall be in the form of either a certified check, cashier's check, bank draft, postal money order, or irrevocable

letter-of-credit, drawn payable to the order of the Bureau of Indian Affairs, or in cash.

(c) The deposit of the apparent high bidder, and of others who submit written request to have their bids considered for acceptance will be retained pending acceptance or rejection of the bids. All other deposits will be returned following the opening and posting of bids.

(d) The deposit of the successful bidder will be retained if the bidder does not:

(1) Furnish the performance bond required by § 163.14 within the time stipulated in the advertisement of timber sale.

(2) Execute the contract, or

(3) Perform the contract.

(e) This section does not limit or waive any further damages available under applicable law or the terms of the contract.

§ 163.11 Acceptance and rejection of bids.

(a) Applicants or bidders may be Indian forest enterprises, members of the tribe, individuals, associations of individuals, partnerships, or corporations. The high bid received in accordance with any advertisement issued under authority of this part shall be accepted, except that the approving officer, having set forth the reason(s) in writing, shall have the right to reject the high bid if:

(1) The high bidder is considered unqualified to fulfill the contractual requirement of the advertisement, or

(2) There are reasonable grounds to consider it in the interest of the Indians to reject the high bid.

(b) If the high bid is rejected, the approving officer may authorize:

(1) Rejection of all bids, or

(2) Acceptance of the offer of another bidder who, at bid opening, makes written request that their bid and bid deposit be held pending a bid acceptance.

(c) The officer authorized to accept the bid shall have the discretion to waive minor technical defects in advertisements and proposals, such as typographical errors and misplaced entries on forms that do not affect clarity, value or money deposits.

§ 163.12 Contracts required.

Except as provided in § 163.19, in sales of timber with an appraised stumpage value exceeding $10,000, the contract forms approved by the Secretary must be used unless a special form for a particular sale or class of sales is approved by the Secretary. Essential departures from the fundamental requirements of standard and approved contract forms shall be made only with the approval of the Secretary. Unless otherwise directed, the contracts shall require that the proceeds be paid by remittance drawn to the Bureau of Indian Affairs and transmitted to the Superintendent. By mutual agreement, contracts may be extended, modified, or assigned subject to approval of the approving officer, and may be terminated by the approving officer upon completion or by mutual agreement.

§ 163.13 Execution and approval of contracts.

(a) All contracts for the sale of tribal timber shall be executed by the authorized tribal representative(s). Contracts must be approved by the Secretary to be valid. There shall be included with the contract, an affidavit executed by the appropriate tribal representative(s) setting forth the resolution or other authority of the governing body of the tribe authorizing the sale.

(b) Contracts for the sale of allotted timber shall be executed by the Indian owners or the Secretary acting pursuant to a power of attorney from the Indian owner, subject to conditions set forth in §§ 163.7 and 163.13(b)(1), (2), and (3). Contracts must be approved by the Secretary to be valid.

(1) The Secretary may, after consultation with any legally appointed guardian, execute contracts on behalf of minors and Indian owners who are non compos mentis.

(2) The Secretary may execute contracts for those persons whose ownership in a decedent's estate has not been determined

or for those persons who cannot be located after a reasonable and diligent search and the giving of notice by publication.

(3) Upon the request of the owner of an undivided but unrestricted interest in land in which there are trust or restricted Indian interests, the Secretary may include such unrestricted interest in a sale of the trust or restricted interests in the timber, pursuant to this part, and perform any functions required of him/her by the contract of sale for both the restricted and the unrestricted interests, including the collection and disbursement of payments for timber and the deductions as service fees from such payments of sums in lieu of administrative expenses.

§ 163.14 Bonds required.

Performance bonds will be required in connection with all sales of Indian timber, except they may or may not be required, as determined by the approving officer, in connection with the use of timber by tribal enterprises pursuant to § 163.6 or in timber cutting permits issued pursuant to §163.19. In sales in which the estimated stumpage value, calculated at the appraised stumpage rates, does not exceed $10,000, the bond shall be at least 20 percent of the estimated stumpage value. In sales in which the estimated stumpage value exceeds $10,000 but is not over $100,000, the bond shall be at least 15 percent of the estimated stumpage value but not less than $2,000; in sales in which the estimated stumpage value exceeds $100,000, but is not over $250,000, the bond shall be at least 10 percent of the estimated stumpage value but not less than $15,000; and in sales in which the estimated stumpage value exceeds $250,000, the bond shall be at least 5 percent of the estimated stumpage value but not less than $25,000. Bonds shall be in a form acceptable to the approving officer and may include a corporate surety bond by an acceptable surety company; or cash bond designating the approving officer to act under a power of attorney; or negotiable United States Government securities supported by appropriate power of attorney; or an irrevocable letter-of-credit.

§ 163.15 Payment for timber.

(a) The basis of volume determination for timber sold shall be the Scribner Decimal C log rules, cubic volume, lineal measure-

ment, piece count, weight, or such other form of measurement as the Secretary may authorize for use. With the exception of tribal enterprises pursuant to § 163.6, payment for timber will be required in advance of cutting.

(b) Methods of payment include advance payments, installment payments and advance deposits as specified in timber contract documents. Each advance deposit shall be at least 10 percent of the value of the minimum volume of timber required to be cut annually, figured at the appraised stumpage rates: *Provided*, that the approving officer may reduce the size of the last advance deposit before the completion of the sale or before periods of approximately three months or longer during which no timber cutting is anticipated. If a contract stipulates no minimum annual cutting requirements, the amount of each advance deposit shall be determined by the approving officer. The advance payments that may be required in the sale of trust timber, pursuant to § 163.16, shall not operate to reduce the size of advance deposits required by this section.

§ 163.16 Advance payment for allotment timber.

(a) Unless otherwise authorized by the Secretary, and except in the case of lump sum (predetermined volume) sales, contracts for the sale of timber from Indian forest lands shall provide for the payment of up to 25 percent of the stumpage value, calculated at the bid price, within 30 days from the date of approval and before cutting begins. Additional advance payments may be specified in contracts that are more than three years in duration. However, no advance payment will be required that would make the sum of such payment and of advance deposits and advance payments previously applied against timber cut from each appropriate ownership exceed 50 percent of the bid stumpage value. For each appropriate ownership, advance payments shall be credited against the timber as it is cut and scaled at the stumpage rates governing at the time of scaling.

(b) Terms and conditions for payment of timber under lump sum sales shall be specified in timber contract documents. Advance payments are not refundable.

§ 163.17 Time for cutting timber.

Unless otherwise authorized by the Secretary, the maximum period which shall be allowed, after the effective date of a timber contract, for harvesting the estimated volume of timber purchased shall be five years.

§ 163.18 Deductions for administrative expenses.

In sales of forest products from Indian forest lands, a reasonable deduction shall be made from the gross proceeds to cover in whole or in part the cost of managing and protecting the forest lands. Such costs will include the cost of sale administration, and forest regeneration. However, such deductions are not intended to cover the costs that are paid from funds appropriated specifically for fire suppression or forest pest control. Unless special instructions have been given by the Secretary as to the amount of the deduction, or the manner in which it is to be made, the deduction shall be 10% of the gross amount received for timber sold. Service fees in lieu of administrative deductions shall be determined in a similar manner.

§ 163.19 Timber cutting permits.

(a) Except as provided in §§ 163.6 and 163.20, all cutting of forest products that is not done under formal contract, pursuant to § 163.12, shall be done under timber cutting permit forms approved by the Secretary. Permits will be issued only with the written consent of the Indian owner(s) or the Secretary, for allotted lands, as authorized in § 163.13. To be valid, permits must be approved by the Secretary. Such consents to the issuance of cutting permits shall stipulate the minimum product rate at which timber may be sold under permit. Payment and bonding requirements will be stipulated in the permit document as appropriate.

(b) Free-use cutting permits may be issued for specified species and types of forest products. Timber cut under this authority may be limited as to sale or exchange for other goods or services. The stumpage value which may be cut in a fiscal year by any individual under this authority shall not exceed $2,500. Individual

shall mean an individual or any operating entity comprised of several individuals.

(c) Paid permits subject to deductions for administrative expenses, as provided in § 163.18, may be issued. Unless otherwise authorized by the Secretary, the stumpage value which may be cut under paid permits in a fiscal year by any individual under this authority shall not exceed $10,000. This paragraph (c) does not apply to special allotment timber cutting permits. Individual shall mean an individual or any operating entity comprised of several individuals.

(d) An Indian having sole beneficial interest in an allotment may be issued an approved form of special permit to cut and sell designated timber from such allotment. The special permit shall include provision for payment by the Indian of administrative expenses pursuant to § 163.18. Unless waived by the Secretary, the permit shall also require the Indian to make a deposit with the Secretary to be returned to the Indian upon satisfactory completion of the permit or to be used by the Secretary in his/her discretion for planting or other work to offset damage to the land or the timber caused by failure to comply with the provisions of the permit. As a condition to granting a special permit under authority of this paragraph, the Indian may be required to provide evidence acceptable to the Secretary that he/she has arranged a bona fide sale of the timber to be cut, on terms that will protect the Indian's interest.

§ 163.20 Free-use cutting without permits.

With the consent of the Indian owners and the Secretary, Indians may cut designated types of forest products from Indian forest lands without a permit or contract, and without charge. Timber cut under this authority shall be for the Indian's personal use, and shall not be sold or exchanged for other goods or services.

§ 163.21 Fire management measures.

(a) The Secretary is authorized to maintain facilities and staff, hire temporary labor, rent fire fighting equipment, purchase tools and supplies, and pay for their transportation as needed, to maintain an adequate level of readiness to meet normal wildfire protection needs and extinguish forest or range fires on Indian reservations or other Indian trust lands. No expenses for fighting a fire outside a reservation may be incurred unless the fire threatens the reservation or other Indian trust lands or unless such expenses are incurred pursuant to an approved cooperative agreement with another protection agency. The rates of pay for fire fighters and for equipment rental shall be the rates for such fire fighting services that are currently in use by public and private wildfire protection agencies adjacent to Indian reservations on which a fire occurs, unless there are in effect at the time different rates that have been approved by the Secretary. The Secretary may also enter into reciprocal agreements with any fire organization maintaining protection facilities in the vicinity of Indian reservations or other Indian trust lands for mutual aid in wildfire protection. This section does not apply to the rendering of emergency aid, or agreements for mutual aid in fire protection pursuant to the Act of May 27, 1955 (69 Stat. 66).

(b) The Secretary will conduct a wildfire prevention program to reduce the number of person-caused fires on Indian reservations or other Indian trust lands.

(c) The Secretary is authorized to expend funds for emergency rehabilitation measures needed to stabilize soil and watershed on Indian reservations or other Indian trust lands damaged by wildfire.

(d) Upon consultation with the Indian landowners, the Secretary may use fire as a management tool on Indian reservations to achieve land or resource management objectives.

§ 163.22 Trespass.

(a) In addition to liability for trespass on Indian lands, as indicated in this part, persons responsible for such trespass may

be prosecuted criminally under any applicable federal law. Penalties are prescribed by the following statutes:

(1) Timber trespass (18 U.S.C. 1853).

(2) Fire trespass (18 U.S.C. 1855, 1856). Tribal ordinances may apply where appropriate.

(b) The extraction, severance, injury or removal of forest products from Indian lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States and the Indian owners, and will be subject to prosecution for such unlawful acts.

(c) The rule of damages to be applied in cases of timber and other trespass will be the measure of damages prescribed by the laws of the State in which the trespass is committed, unless by federal law a different rule is prescribed or authorized.

(d) The Secretary may identify and forbid the removal of forest products from restricted or trust Indian lands or direct their removal to a point of safekeeping when there is reason to believe that such products were unlawfully cut. Any such forest products that can be positively identified as Indian trust property should be sold to prevent their deterioration. When any forest products cut in trespass are found to be removed to land not under Government supervision, the owner of the land should be notified that such products are Indian trust property and any further action should be upon advice of the Office of the Solicitor of the Department of the Interior. Any forest products sold under this § 163.22 may be disposed of under the provisions of this part, insofar as they are applicable. The Secretary may accept payment of damages in full in the settlement of civil trespass cases without resort to court action. The Secretary may also accept a recommended settlement per Solicitor's Regulations Manual I.4.1 when exercised in accordance with Departmental procedures contained in 344 DM 3. All other matters relating to the collection of debts under this section will be in accordance with departmental Manual, Part 344.

(e) The Secretary will provide for timely action on any reports of trespass on Indian trust lands including pending Native allotments (25 U.S.C. 9).

§ 163.23 Revocable road use and construction permits for removal of commercial forest products.

(a) The Secretary may request tribes and/or all other trust landowners to sign landowners revocable permits designating the Secretary as Agent for the landowner and empowering him/her to issue revocable road use and construction permits to users for the purpose of removing commercial forest products.

(b) When a majority of trust interest in a tract has consented, the Secretary may issue revocable road use and construction permits for removal of commercial forest products over and across individually owned lands. In addition, the Secretary may act for individual owners when:

(1) The individual owner of the land or of an interest therein is a minor or a person non compos mentis, and the Secretary finds that such grant, in total or for an interest therein, will cause no substantial injury to the land or the owner, which cannot be adequately compensated for by monetary damages;

(2) The whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known or majority thereof, consent to the grant;

(3) The heirs or devisees of a deceased owner of the land or interest therein have not been determined, and the Secretary finds the grant will cause no substantial injury to the land or any owner thereof, provided that once the heirs or devisees of the deceased owner are determined, their consent is obtained.

(c) Nothing in this section shall preclude acquisition of rights-of-way for roads, Subchapter H, Part 169, 25 CFR, or conflict with provisions of that part.

§ 163.24 Insect and disease control.

(a) The Secretary is authorized to protect and preserve from disease, or the ravages of beetles, or other insects, timber on

Indian reservations or other Indian lands under the jurisdiction of the Department of the Interior. (Sept. 20, 1922, Ch. 349, 42 Stat. 857). The Secretary shall consult with authorized tribal representatives or owners of other Indian lands concerning control actions.

(b) The Secretary is responsible to control and mitigate harmful effects of insects and diseases on Indian forest lands. The Secretary will coordinate this control with the Secretary of Agriculture in accordance with Section 5, Pub. L. 95-313, July 1, 1978, 92 Stat. 336.

§ 163.25 Forest development.

This section pertains to that segment of the forestry program which addresses the improvement of timber resources. The program shall consist of forestation, timber stand improvement work, and related investments that enhance productivity. It shall be conducted with emphasis on on-site activities. Forest development funds will be used to establish, re-establish, maintain, and/or improve growth of desirable commercial timber species and stocking level. Forest development activities will be planned and executed using cost/benefit analyses as one of the determinants in establishing priorities.

§ 163.26 Appeals under timber contracts and permits.

Any action taken by an approving officer exercising delegated authority from the Secretary of the Interior or by a subordinate official of the Department of the Interior exercising an authority by the terms of the contract may be appealed. Such appeal shall not stay any action under the contract unless otherwise directed by the Secretary of the Interior. Such appeals shall be filed in accordance with the provision of 25 CFR Part 2, appeals from Administrative Actions, or any other applicable general regulations covering appeals. Appropriate Indian representatives shall be notified upon receipt of an appeal initiated by the purchaser. Likewise, the purchaser shall be notified upon receipt of an appeal initiated by the seller.

§ 163.27 Environmental protection.

Before implementing these regulations, forestry personnel will review their timber sale activities for potential environmental impacts in accordance with the National Environmental Policy Act (NEPA) of 1969 and applicable Council on Environmental Quality Regulations (40 CFR 1500-1508). NEPA compliance is further explained in Departmental Manual Part 516 DM (Environmental Quality) and 30 BIAM Supplement 1 (NEPA Handbook) of the Bureau of Indian Affairs, from which specific guidance is obtained.

Appendix E

The California Forest Taxation Reform Act (Cal.Rev. and Tax.Code sections 38101 et seq.)

§ 38101. Short title

This part is known and may be cited as the "Timber Yield Tax Law."

§ 38103. Timber

"Timber" means trees of any species maintained for eventual harvest for forest products purposes, whether planted or of natural growth, standing or down, including Christmas trees, on privately or publicly owned land, but does not mean nursery stock.

§ 38103.1. Timberland

"Timberland" means privately or publicly owned land which is devoted to and used for growing and harvesting timber, or for growing and harvesting timber and compatible uses, and which is capable of growing an average annual volume of wood fiber of at least 15 cubic feet per acre.

§ 38104. Timber owner

"Timber owner" means any person who owns timber immediately prior to felling or the first person who acquires either the legal title or beneficial title to timber after it has been felled from land owned by a federal agency or any other person or agency or entity exempt from property taxation under the Constitution or laws of the United States or under the Constitution or laws of the State of California. "Timber owner" includes any person who owns or acquires legal title or beneficial title to downed timber in this state.

§ 38115. Rate

A timber yield tax is hereby imposed on every timber owner who harvests his timber or causes it to be harvested on or after April 1, 1977, and on every timber owner of felled or downed timber who acquires title to such felled or downed timber in this state from an exempt person or agency described in Section 38104

on or after that date, at the rate of 6 percent of the total immediate harvest value of that timber or at such other rate as may be fixed pursuant to Chapter 3 (commencing with Section 38202) of this part. The immediate harvest value shall be determined as of the scaling date.

§ 38202. Adjustment of yield tax rate; computation

During December, 1978, and December of each subsequent year, after public hearings, the board shall adjust the yield tax rate to the nearest one-tenth of 1 percent in the same proportion that the average rate of general property taxation in the rate adjustment counties in the current tax year differs from the average rate of general property taxation in the rate adjustment counties in the preceding tax year. The board shall compute the average rate of general property taxation in the rate adjustment counties by (a) adding the county, city, school district, and other general taxes, but not the special taxes on intangibles, aircraft, baled cotton or any other property, which is subject to a uniform statewide tax rate, nor special assessments, and (b) dividing the amount obtained by the total assessed valuation in the rate adjustment counties, exclusive of the homeowners' and business inventory exemptions, as shown by the county tax rolls for the same year.

"Total assessed valuation," as used in this section, does not include the assessment of property which is subject to a uniform statewide tax rate.

"Special assessment" as used in this section, means any amount levied solely against land or land and improvements.

§ 38301. Imposition; rate

A timber reserve fund tax is hereby imposed on every timber owner who harvests his timber or causes it to be harvested on and after April 1, 1977, to and including December 31, 1982, and every timber owner of felled or downed timber who acquires title during that period to such felled or downed timber in this state from an exempt person or agency described in Section 38104, at the rate of 0.5 percent of the total immediate harvest value of that timber, or at such other rate as may be fixed pursuant to

Section 38303. This tax is in addition to the tax imposed by Section 38115. The immediate harvest value shall be determined as of the scaling date.

§ 38351. Necessity; requirements

Every person who owns timber subject to a timber harvest plan, every person who is required to file a notice of timber operations with the State Forester, and every person who is the first person who acquires either legal title or beneficial title to downed timber or timber after it has been felled from land owned by a federal agency or any other person or agency entity exempt from state taxation under the Constitution or laws of the United States or under the Constitution or laws of the State of California shall register with the board giving such information as the board may require.

§ 38901. Remittances; deposit

All taxes, interest and penalties imposed and all amounts of tax required to be paid under this part shall be made in remittances to the State Board of Equalization and shall be deposited in the State Treasury as provided in this chapter.

§ 38903. Timber tax refund; creation; deposits

(a) All taxes, interest, penalties and other amounts paid or collected pursuant to this part on or before July 31, 1983, except taxes paid or collected pursuant to Section 38301, shall be deposited in the Timber Tax Fund, which is hereby created.

(b) On and after August 1, 1983, all taxes, interest, penalties, and other amounts paid or collected pursuant to this part shall be deposited in the Timber Tax Fund.

(Amended by Stats.1982, c. 1058, p. 3830, § 4; Stats.1983, c. 1281, § 47, eff. Sept. 30, 1983.)

§ 38903.1. Repealed by Stats.1984, c. 678, § 43

§ 38904. Timber tax fund; appropriation; uses

The money in the Timber Tax Fund is appropriated as follows:

(a) To reimburse the General Fund for funds advanced for costs incurred by the board in administration of this part as follows:

(1) Four hundred sixty-seven thousand nine hundred thirty dollars ($467,930) for fiscal years 1975-76 and 1976-77.

(2) Amounts identified and approved in subsequent fiscal years as approved in the Budget Bill. One-half of this amount shall be reimbursed to the General Fund on November 30, and the remaining one-half on May 31. In the event that not all funds approved in the Budget Bill are actually expended by the board, then in the succeeding fiscal year, the amount to be reimbursed to the General Fund on November 30 shall be reduced by an amount equal to the unexpended appropriation of the preceding fiscal year.

(b) To reimburse the General Fund for funds advanced for costs incurred by the State Forester in administration of Section 4582.8 of the Public Resources Code as follows:

(1) Thirteen thousand five hundred dollars ($13,500) for fiscal years 1975-76 and 1976-77.

(2) Amounts identified and approved in subsequent fiscal years as approved in the Budget Bill.

(c) To the Controller to allocate pursuant to Sections 38905 and 38905.1.

(d) To pay refunds authorized by this part of taxes imposed pursuant to Section 38115 and interest, penalties, and other amounts paid or collected pursuant to this part and deposited in the Timber Tax Fund.

§ 38905.1. Timber tax fund; transmittal to county treasurers; distribution; legislative intent

(a) Commencing with the 1983-84 fiscal year, the Controller shall, pursuant to subdivision (c) of Section 38904, on November 30 and May 31 of each fiscal year, transmit to county treasurers the balance in the Timber Tax Fund on those dates, in accordance with the following allocation schedule:

(1) For the 1983-84 fiscal year, 50 percent of the balance in Timber Tax Fund shall be transmitted to county treasurers based on the annual yield tax revenue guarantee certified for each county pursuant to subdivision (c) or (e) of Section 27423 of the Government Code. The remaining 50 percent of the balance in the fund shall be transmitted to county treasurers in the same proportion that the balance to be transmitted was generated from each county, as certified by the State Board of Equalization.

(2) For the 1984-85 fiscal year and each fiscal year thereafter, 100 percent of the balance in the fund shall be transmitted to county treasurers in the same proportion that the balance to be transmitted was generated from each county, as certified by the State Board of Equalization.

(b) Upon receipt of funds pursuant to subdivision (a), the county auditor shall within 10 days distribute the funds among the jurisdictions (as defined in Section 95) within the county in the same proportion that each jurisdiction's minimum revenue guarantee, determined pursuant to Section 27423 of the Government Code, bears to the total of all those amounts for all jurisdictions within the county.

(c) It is the intent of the Legislature that the provisions of subdivision (a) shall provide a final and conclusive disposition of the problem of allocating yield tax revenues among counties entitled to those revenues.

§ 38908. Expenditure of allocated funds by local entities

Local governmental entities which are allocated funds pursuant to Section 38905 or * * * 38905.1 may expend such funds without restriction.